Intelligence MEMOS

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From: Charles DeLand and Brad Gilmour

To: Canadian Project Watchers

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Re: **More Work Needed on Major Project Legislation**

One reason Canada's per capita GDP has stalled and may continue to stagnate, putting Canadians' living standards at risk, is that we struggle to build large projects cheaply and quickly.

The federal government has finally acknowledged there is too much uncertainty in getting major projects approved and has promised certain "fixes," including recently enacted amendments to its controversial *Impact Assessment Act* (IAA), which opponents tagged the "No more pipelines act." Are those amendments on the right track and will they help get projects built? In our view, no. Instead, we need serious fixes to avoid further litigation and investment uncertainty.

The IAA amendments are a response to the Supreme Court of Canada's landmark decision last October holding that the IAA was largely unconstitutional. In short, the court held that the branch of government that has the primary role in approving an activity also has broad authority to both regulate its environmental impact and to decide whether a project is in the public interest. In most cases, the province is the responsible jurisdiction. In some cases, however, the federal government may have a role in regulating some aspect of the activity, though not its entirety.

This April, the federal government offered draft amendments to the IAA that came into force in June. On the upside, Ottawa seemed to acknowledge it does not have broad jurisdiction over GHG emissions by dropping federal assessments of projects based solely on their GHG emissions.

On the downside, however, there are several problems with the amendments. For example, despite some new but modest restraints, it remains unclear what actually triggers the act. Instead of being engaged based on any "effect within federal jurisdiction," (which the Supreme Court found to be unconstitutional) the proposed amendment shifts to: "Adverse effects within federal jurisdiction" that result in "non-negligible" changes to matters over which the federal government purports to have jurisdiction.

What exactly a "non-negligible" change might be is obviously open to broad (even truck-sized) interpretation. An amended IAA should be much clearer about when it applies and should stick to questions that are unambiguously in federal jurisdiction.

Both the IAA and provincial statutes include public interest decision-making structures that try to establish how proposed changes will affect a broad group of citizens. These competing structures can be in conflict and therefore create even greater uncertainty. In such cases, whose assessment of the public interest prevails?

Public interest tests should be reserved for the authority that regulates a project's activity. When that's the province, as is typical, the federal government should not be making broad public interest decisions. The amendments leave things unfocused and ambiguous in this regard. The IAA needs to clearly limit broad federal public interest tests to activities that are under federal jurisdiction.

Ultimately, we need more clarity – especially regarding federal restraint – from the amendments. Major investments like ports, airports, pipelines, roads, transmission lines, natural resource developments and manufacturing projects are complex. They require a regulatory process that can mitigate any serious harms they may pose – but also ensure they can be completed in a timely manner. The amendments to the IAA fail to correct fundamental problems and will be unlikely to generate clear and efficient reviews. The right move would be for federal and provincial governments to respect jurisdictional boundaries and eliminate parallel public interest tests.

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